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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ——

THE UNITED STATES, PETITIONER

v.

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The opinions in the Court of Claims (Appendix B, *infra,* pp. 20–28) are reported at 121 F. Supp. 932.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1954 (Appendix B, *infra,* p.

44). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Where a manufacturer of articles which are subject to a manufacturers' excise tax incurs expenses in the course of making good on warranties extended on these articles, is a credit or refund of the tax required, as the Court of Claims held, on the ground that such expenses constitute a readjustment in "price * * * by a bona fide discount, rebate, or allowance" within the meaning of Section 3443 (a) (2) of the Internal Revenue Code of 1939?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 3405 and 3443 of the Internal Revenue Code of 1939 and the Regulations involved are Treasury Regulations 46, Sections 316.13 and 316.14, both of which are set forth in Appendix A, *infra*, pp. 16–19.

STATEMENT

The taxpayer is a manufacturer of refrigerators. During the years here in question—1937 to 1941—its refrigerators were sold with two warranties. The first was a general guarantee that the entire product, except the refrigerating unit, was "free from defects in material and workmanship under normal use and service." (Appendix B, *infra*, p. 32.) The second was a five-year warranty, extending solely to the refrigerating unit.

(Appendix B, *infra,* p. 31.) For this second warranty the company imposed a mandatory additional charge of $5 per refrigerator (Appendix B, *infra,* p. 35), applicable to all except multiple unit purchasers. All sales of refrigerators were made by the taxpayer to General Motors Sales Corporation, Frigidaire Division, a wholly owned subsidiary of the taxpayer. (Appendix B, *infra,* p. 37.)

In determining its excise tax due under Section 3405 of the Internal Revenue Code of 1939 (Appendix A, *infra,* pp. 16–17),[1] the taxpayer did not include this $5 charge in the tax base. The Commissioner, on the ground that the $5 charge was part of the manufacturer's selling price of the refrigerator on which the tax was required to be paid, assessed a deficiency of $537,886.02, plus interest (Appendix B, *infra,* p. 29), which was duly paid. Thereupon the taxpayer, on October 9, 1943, filed a claim for refund, which was denied by the Commissioner on January 4, 1946 (Appendix B, *infra,* pp. 29–30), and a suit for refund was initiated in the Court of Claims on March 26, 1947.

The taxpayer's refund suit was based on two alternative contentions: (1) That the $5 charge for the five-year warranty on the refrigerating unit was not part of the "price" and hence was not subject to the excise tax; and (2) that even

[1] Prior to 1939 the tax was imposed by Section 608 of the Revenue Act of 1932, c. 209, 47 Stat. 169, as amended.

if it were, the taxpayer was entitled to a credit on account of the expenses incurred by it in fulfilling the warranty, on the theory that such expenditures constituted a "price" readjustment "by a bona fide discount, rebate, or allowance" for which a tax credit or refund is allowable under Section 3443 (a) (2) of the Internal Revenue Code of 1939.

On the first question, the Court of Claims, with two dissents, concluded that since the taxpayer sold "a warranted refrigerator, and not a refrigerator and something else," the $5 charge must be included in the tax base. (Appendix B, *infra,* p. 21.) On the second question, however, the Court of Claims, accepting the alternative contention, ruled that the taxpayer was entitled to a $240,000 refund on the ground that its expenses in connection with the repairs and replacements under the five-year warranty were in the nature of "a bona fide discount, rebate, or allowance" within the meaning of Code Section 3443 (a) (2). (Appendix B, *infra,* p. 23.)[2] It is this latter holding which is here sought to be reviewed.

[2] Although we have serious doubts whether some of the expenses incurred in this case would, on more intensive examination, be found to be deductible even under the view of the statute entertained by the Court of Claims, that court took the position (Appendix B, *infra,* p. 23) that certain concessions made by the Government were tantamount to a stipulation concerning the amount to be recovered by the taxpayer if it prevailed on this issue. In view of that, certiorari is being requested to review only the ultimate legal

REASONS FOR GRANTING THE WRIT

1. The Court of Claims has decided an important question of federal tax law which has not been but should be settled by this Court. The decision of the Court of Claims, which is entirely without precedent, embodies a ruling of large importance and raises serious and complex problems in the administration of the manufacturers' excise tax. The court decided, for the first time in the twenty-two years that the statutory provision has been in effect,[3] that any of the approximately 19,000 manufacturers of articles subject to the manufacturers' excise tax is now entitled to a refund or credit on account of any funds expended in connection with the free repair or replacement of such articles pursuant to warranties covering these items.

In view of the number of transactions affected, the number of taxpayers whose tax liability is thereby reduced, and the amount of revenue lost to the Government, as well as the administrative complications involved in complying with the decision, the far-reaching significance of the Court of Claims' ruling in the enforcement of the federal excise tax law is manifest. A vast

issue decided by the Court of Claims, and no question will be raised in this case as to the specific items of expense to be credited against the "price," if the Court of Claims is upheld in its broad ruling that expenses of this character are deductible at all.

[3] This provision was first introduced by Section 621 (a) (2) of the Revenue Act of 1932, c. 209, 47 Stat. 169.

variety of articles are subject to the various manufacturers' excise taxes. Among the most important of these are: Automobiles, motorcycles, trucks, buses, bus or truck trailers, parts and accessories for any of the foregoing; household type refrigerators, quick-freeze units, and air-conditioners; many categories of household type appliances, both large and small, including stoves, clothes dryers, water heaters, dishwashers, mangles, garbage disposal units; television sets, radios, phonographs and musical instruments; photographic equipment; fountain pens; a variety of business and store machines, including adding machines, typewriters, cash registers, addressing machines, check-writing machines, dictaphones, calculating, computing, and tabulating machines, card punch and sorting machines, and various kinds of duplicating machines. (Sections 3403–3408, Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sections 3403–3408).)

It is common knowledge that most of these articles are sold with some kind of warranty. Yet the rationale of the Court of Claims' decision is so sweeping that all expenditures incurred in making good on any kind of warranty—be it separately charged for or not,[4] be it express or im-

[4] Subsequent to the decision in the Court of Claims, General Motors filed a supplemental refund claim asserting for the first time the deductibility of $6,800,000 of expenses incurred on its *one-year warranty* with respect to sales made during the period January 1, 1947, to August 31, 1951. The

plied—now go to reduce the tax payable, as though the selling "price" had been subsequently "readjusted * * * by a bona fide discount, rebate, or allowance," in the amount, large or small, expended by the manufacturer in fulfilling his obligation under the warranty. In point of fact, however, as indicated, *infra,* at p. 12, such expenditures by the manufacturer do not in any way reduce the price paid by the customer; their purpose and effect is simply to give him a good article, rather than a defective one, for the money he has already paid, the "price" remaining the same throughout.

The manufacturers' excise taxes contribute substantial amounts of revenue to the federal fisc and are collected from a large number of taxpayers. For example, in the twelve-month period ending June 30, 1954, the revenue attributable to these taxes was approximately 2.7 billions of dollars, and the taxes were collected from approximately 19,000 different manufacturers.

The amount of money which would have to be refunded if the decision below is permitted to stand cannot, of course, be computed to the last penny. Since, prior to the decision below, there had never been any serious suggestion that the statute could be construed in this manner, no sta-

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basis of claiming a tax credit for the expenses relative to this warranty, for which no separate charge is made, was said to be the decision of the court below.

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tistical data is now available on which to base a precise estimate of the total amount expended by manufacturers of taxable articles in fulfilling their obligations under warranties. However, the present case, if representative, furnishes some idea of the magnitude of the amount of money which may be involved as a consequence of the decision of the Court of Claims. The total taxes on only this one class of articles—refrigerators and other cooling devices—paid by this single taxpayer during the period in controversy are approximately $10,500,000, while the amount to be refunded under the decision below is about $240,000, which represents more than two per cent of the total tax paid.[5] Thus, assuming, conservatively, that only half the total revenue collections from all the manufacturers' excise taxes is from articles covered by warranties, and that the warranty expenditures of other manufacturers are approximately the same in proportion to the sales price as General Motors', the ultimate potential

[5] In addition to the instant claim, General Motors has filed other refund claims totaling more than one million dollars on account of five-year warranty expenditures applicable to sales during the period January 1942 to August 1951. Also, as indicated in footnote 4, *supra*, General Motors, since the instant decision, claims the deductibility of close to eight million dollars of one-year warranty expenditures, which, if sustained, would result in a further tax refund of approximately $600,000. All of these claims, aggregating approximately $1,840,000 just for this one taxpayer and this one class of articles (refrigeration products), are currently pending, awaiting the outcome of this litigation.

revenue loss attributable to tax collections in the fiscal year 1954 alone, as a result of the Court of Claims' decision, would be 27 million dollars. Furthermore, since refund claims can still be filed by all taxpayers who stand to benefit under the decision below on account of sales made during the past four years (if those years have not yet been barred by limitations),[6] the potential loss to the revenue may come close to or exceed 100 million dollars. In addition, the problem will continue to be a pressing one in ensuing years with respect to future expenditures of this character.

2. We need scarcely emphasize that contests with respect to excise taxes can only arise in refund suits, and that the Court of Claims is the only tribunal invested with nation-wide jurisdiction in such cases. Consequently, the necessity for review by this Court of a decision having such far-reaching scope and importance is not at all diminished by the absence of any conflicting decisions of other tribunals on the novel construction of the statute now adopted by the Court of Claims. Indeed, since the decision of the Court of Claims makes it crystal clear that all taxpayers similarly situated will be granted refunds by that

[6] Internal Revenue Code of 1939, Sec. 3313 (26 U. S. C. 1952 ed., Sec. 3313) provides for a four-year period. But under the Internal Revenue Code of 1954, Section 6511, the limitations period is reduced to 3 years. However, it is uncertain whether this latter provision will be applied to returns filed prior to the effective date of the 1954 Code.

court, and since all such taxpayers are entitled of right to invoke the jurisdiction of that court, it can be expected that all such refund suits will now be filed in the Court of Claims, thereby making it extremely unlikely that a conflict on this point will ever develop. Consequently, protection of the revenue and preservation of the intent of Congress warrant review by this Court of the decision below despite the absence of conflicting decisions.

3. The Court of Claims' holding that a manufacturer's costs of fulfilling a warranty can be deducted from the "price" of the article, and thus reduce the tax payable, finds absolutely no warrant in the statutory language. The statute (Code Section 3443 (a) (2) (Appendix A, *infra*, p. 17)) provides that—

> A credit against tax under this chapter, or a refund, may be allowed or made—
>
> * * * * *
>
> (2) * * * *when the price* on which the tax was based *is readjusted* by reason of return or repossession of the article or a covering or container, *or by a bona fide discount, rebate, or allowance;* in the amount of that part of the tax proportionate to the part of the price which is refunded or credited. [Italics supplied.]

The section in terms is applicable where the selling "price" of the manufactured article has been "readjusted" by a "bona fide discount, rebate, or

allowance" constituting a part of the price which is "refunded or credited" to the purchaser. The obvious purpose of this provision is to make sure that the tax is based on the net amount of the sales price actually received or retained by the manufacturer, rather than on a fictitious gross price which does not reflect a discount, rebate, trade-in or similar allowance which may have been given to the purchaser. Its purpose is not, as the court below appears to have assumed, to assure that the tax is imposed solely on the manufacturer's profits which remain after deducting expenses incurred after the product is sold.

This point is made quite clear in the House Report on the 1932 Revenue Act, which first introduced this provision into the law. It is there stated (H. Rep. No. 708, 72d Cong., 1st Sess., p. 39 (1932) (1939–1 Cum. Bull. (Part 2) 457, 485)):

> This last provision [allowing the credit or refund] covers readjustments such as cash or quantity discounts, credit for return of goods or containers, *and any other bona fide rebate or allowance amounting to a change in the sale price.* [Italics supplied.]

Where the manufactured article does not conform to the standards specified by the parties in the agreement of sale, and the manufacturer, in accordance with the terms (whether express or implied) of the agreement, repairs or replaces the article, there has been no "readjustment" of the

"price" of the article, and no part of the purchase price has been "refunded or credited" to the vendee, as these words are commonly understood. The manufacturer, in making the repair or replacement, has merely furnished the purchaser (at a later date) with the kind and quality of merchandise which should have been, but was not, delivered in the first instance. In common parlance a "readjustment" in the "price" of an article is made only when some or all of the cash consideration furnished by the purchaser is returned to him; and only in such circumstances has part of the purchase price been "refunded or credited." The expenses of making good on the warranty are part of the "cost" of the article, like other expenses of manufacture. All such items of cost are to be taken into account, of course, in determining the manufacturer's profits for income tax and similar purposes; none can properly be treated, however, as reducing the "price" paid by the customer and received by the seller.

That the statute was intended to have the meaning conveyed by the everyday usage of these words is evident not only from the above-quoted excerpt from the Committee Report but also from the Treasury Regulations which construe the statute. Thus, Section 316.14, Treasury Regulations 46 (1940 ed.) (Appendix A, *infra*, pp. 18-19) provides that where an article is sold under

a guaranty and the article is "thereafter returned and a rebate made pursuant to the guaranty" a credit may be had for a proportionate part of the tax originally paid. In the described circumstances there has been a readjustment in price and a refund or credit of part of the price has been made because of the return to the purchaser of a part of the consideration originally paid. Such, however, is not the situation here.

Section 316.14 also provides that if the article is returned and a new article is furnished free or at a reduced price, the tax on the new article "shall be computed on the actual amount, if any, to be paid to the manufacturer for the new article." This provision is significant in the context of this case; for, the Regulations say in effect: If, in the course of making a replacement, a manufacturer receives additional consideration, an additional tax will be payable; and, if no additional consideration is received, i. e., if the replacement or repair is made free of charge, no additional tax will be payable. But the Regulations pointedly omit a provision stating that, if a manufacturer's replacement expenses exceed the consideration, if any, which he received from the purchaser, he will then be entitled to a tax credit or refund.

The Regulations have used similar language ever since they were first promulgated in Article 14 of Treasury Regulations 46 construing the 1932

Act. Consequently, even if the statutory language were less clear on its face, this long-standing construction, buttressed by twenty-two years of continuous and harmonious administrative practice, should have been accorded great weight, but it was not referred to in the opinion below. Congress has repeatedly enacted and revised the revenue laws, including the excise tax provisions, during this period, without indicating in any way that the administrative interpretation of the statute is at variance with the Congressional intent. See *Lykes* v. *United States,* 343 U. S. 118, 127, and cases cited. Indeed, Congressional acceptance of the regulations is manifested by Code Section 3443 (b) (Appendix A, *infra,* p. 18), which expressly provides that credits or refunds "shall be allowed or made only upon compliance with regulations prescribed by the Commissioner."[7]

[7] The decision of the Court of Claims contravenes the Regulations in yet another respect. Section 316.13 of the Regulations (Appendix A, *infra*, p. 18), in dealing with readjustments of price, states that "allowances, payments, or adjustments made to persons other than the manufacturer's vendee are not deductible from the sale price under any conditions for purposes of computing the tax." The taxpayer's vendee here was General Motors Sales Corporation, Frigidaire Division, its wholly owned subsidiary. Almost none of the taxpayer's expenses in this case represented allowances, payments or adjustments made to the vendee. Consequently, even if the statute could possibly be interpreted as it was by the Court of Claims to treat these expenses as though they were price readjustments, credit or refund would be allow-

CONCLUSION

The Court of Claims has erroneously decided a question of substantial importance in the administration of the revenue laws which, for the reasons stated, warrants review at this time by the Court. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

DECEMBER 1954.

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able to this taxpayer only for the small handling allowance made to the General Motors Sales Corporation in those few instances where the Sales Corporation also acted as the distributor. (Appendix B, *infra*, p. 37).

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Appendix A

Internal Revenue Code of 1939:

Sec. 3405. Tax on Mechanical Refrigerators.

There shall be imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 5 per centum [8] of the price for which so sold:

(a) Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories therefor sold on or in connection therewith or with the sale thereof).

(b) Cabinets, compressors, condensers, expansion units, absorbers, and controls (hereinafter referred to as "refrigerator components") for, or suitable for use as part of or with, any of the articles enumerated in subsection (a) including in each case parts or accessories for such refrigerator components sold on or in connection therewith or with the sale thereof) except when sold as component parts of complete

[8] The rate of tax was increased to 5½ per centum by Section 1650 of the Internal Revenue Code of 1939 (26 U. S. C. 1946 ed., Sec. 1650), as added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516. Section 546 of the Revenue Act of 1941, c. 412, 55 Stat. 687, imposed a rate of 10% on such articles, effective October 1, 1941.

refrigerators or refrigerating or cooling apparatus. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this subsection shall not apply in the case of sales of any such refrigerator components by the manufacturer, producer, or importer to a manufacturer or producer of refrigerators or refrigerating or cooling apparatus. If any such refrigerator components are resold by such vendee otherwise than on or in connection with, or with the sale of, complete refrigerators or refrigerating or cooling apparatus, manufactured or produced by such vendee, then for the purposes of this section the vendee shall be considered the manufacturer or producer of the refrigerator components so resold.

(26 U. S. C. 1952 ed., Sec. 3405.)

SEC. 3443. CREDITS AND REFUNDS.

(a) A credit against tax under this chapter, or a refund may be allowed or made—

* * * * *

(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

* * * * *

(b) Credit or refund under subsection (a) shall be allowed or made only upon compliance with regulations prescribed by the Commissioner with the approval of the Secretary.

(26 U. S. C. 1952 ed., Sec. 3443.)

Treasury Regulations 46 (1940 ed.):

SEC. 316.13 *Discounts and adjustments, generally.*—Readjustments in sale price (such as allowable discounts, rebates, bonuses, etc.) can not be anticipated. The tax must be based upon the original price unless the readjustments have actually been made prior to the close of the month in which the tax upon the sale is returned. However, if the price upon which the tax was computed is subsequently readjusted, a proper credit may be taken against the tax due on a subsequent return, or an appropriate claim for refund may be filed. (See section 316.94.)

* * * * *

Commissions to agents, or allowances, payments, or adjustments made to persons other than the manufacturer's vendee are not deductible from the sale price under any conditions for purposes of computing the tax.

SEC. 316.14 *Exchanges, etc.*— * * *

If an article is sold under a guaranty as to its quality or service, and is thereafter returned and a rebate made pursuant to the guaranty, the manufacturer may claim credit or refund of such portion of the tax

originally paid in respect of the article as is proportionate to the part of the price refunded to his vendee.

Where any taxable article is returned to the manufacturer thereof by his vendee for adjustment, replacement, or exchange, under a guaranty as to quality or service, and a new article given pursuant to the guaranty, free, or at a reduced price, the tax shall be computed on the actual amount, if any, to be paid to the manufacturer for the new article.

The above sections are substantially the same as Articles 12, 13, and 14 of Treasury Regulations 46 (1932 ed.).

APPENDIX B

In the United States Court of Claims

No. 47657

(Decided June 8, 1954)

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION, v. THE UNITED STATES

Mr. Newell W. Ellison for plaintiff. *Messrs. Henry M. Hogan, Daniel M. Gribbon, Calvert Thomas, Donald C. Alexander*, and *Covington & Burling*, were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for defendant. *Messrs. Andrew D. Sharpe* and *Joseph H. Sheppard* were on the brief.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover certain manufacturers' excise taxes paid by it for the period May 10, 1937, through December 31, 1941. It manufactured electric refrigerators which were subject to a manufacturer's excise tax imposed by Section 608 of the Revenue Act of 1932 until March 1939, and thereafter by Section 3405 of the Internal Revenue Code. The part of the taxes in controversy were those attributable to a $5 charge which the plaintiff made in the sale of each refrigerator for a warranty which will presently be described.

In the sale of a refrigerator, the plaintiff included a certificate which comprised a warranty of all parts of the refrigerator except the sealed-in refrigerating unit for one year,

and an agreement to repair or replace the refrigerating unit in the event that that unit became inoperative within five years following the date of the refrigerator's delivery to the original householder purchaser. The latter agreement was designated in the certificate as the "Five-Year Protection Plan." The Five-Year Protection Plan was priced at $5 by the plaintiff, that price was separately stated on the plaintiff's invoices to its vendees, and all persons buying the refrigerators were obliged, with exceptions not here material, to pay for the Protection Plan.

In 1933 the plaintiff had offered a warranty for one, two, or three years, at $6 a year, at the option of the purchaser. In 1935 it offered a four-year warranty for $10, still at the option of the purchaser. In 1936 it adopted the plan which is here involved.

The plaintiff says that it sold refrigerators and "something else," and that that something else was not within the category of things subject to the manufacturer's excise tax. We think that what the plaintiff sold was a warranted refrigerator, and not a refrigerator and something else. In any sale of new merchandise, there is an implied warranty of fitness. In the sale of the refrigerators here in question, that implied warranty was replaced by an express warranty of all parts of the refrigerator for one year. This express warranty may have been more, or less, extensive than the warranty which the law would have read into the sale by implication, if there had been no express warranty. One may suppose, for example, that if the cabinet of a refrigerator corroded within two years that would show that it was unfit for the purpose for which it was sold. As to other parts, the one-year warranty may have been for a longer period than the implied warranty would have covered.

The plaintiff does not claim that some portion of the sale price should be tax free because of the express warranty for one year. It does, however, make such a claim as to the five-year warranty of the sealed-in mechanical unit. We see no difference whatever between the two warranties, nor between the two express warranties, on the one hand, and the warranty which the law would, in the absence of an express warranty, have attached to the sale, on the other hand.

To be sure, the plaintiff assigned, for its accounting purposes, a five-dollar price to the five-year warranty. That is certainly immaterial. If any of these warranties were "something else," in addition to the refrigerators, within the meaning of the tax statute, the tax-free price of that something else would have to be determined in some way other than by arbitrary assignment by the seller in cases where the buyer has no choice and therefore no part in the fixing of the price of the "something else."

If a manufacturer with a lesser reputation than General Motors attempted to sell refrigerators intrinsically as good as those sold by General Motors, it would almost certainly have to sell them at a lower price in order to compete successfully. Because its price was lower, it would pay less tax. General Motors could say, truthfully, that the purchaser of a General Motors refrigerator was getting a refrigerator and "something else," viz, the feeling of security arising from the fact that the manufacturer had a fine reputation. But General Motors could not assign a price to that something else and claim that that part of the sales price of its refrigerators was tax free.

The excise tax statute here involved would be indeed difficult of administration if the several kinds and extents of warranties by implication, by custom of the trade, and by express agreement, attached to sales of products, could be priced and the prices deducted from the taxable price of the product sold. In the instant case, several years' experience with the five-dollar price assigned by the plaintiff to the five-year warranty showed that it yielded a profit of more than 100 percent above the cost of fulfilling the warranty. Whether that is the plaintiff's normal profit on what it sells, we do not know. How much the one-year warranty added to the selling price of the refrigerators and how much it cost to fulfill it, we do not know. We think that Congress did not intend that the taxing authorities should have to concern themselves with those problems.

The precedents cited by the plaintiff relate to combinations of two tangible objects, one taxable and the other not, such as costume jewelry and dresses, pencils and notebooks, and fur trimming on cloth coats. In those cases the "something else" was obvious and tangible.

The plaintiff's alternative claim is not valid. It is based upon Section 3441 (a) of the Internal Revenue Code which says:

> In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

We think that the five-dollar charge here in question is not of the nature of a transportation, delivery, insurance, or installation charge, and is therefore not covered by the words "or other charge" which appear in the sentence excluding certain charges. The five-dollar charge was included in the price of the refrigerators when they were packed ready for shipment and the paper containing the contract of warranty was packed in the refrigerator.

We think, however, that the plaintiff may recover on its claim that it is entitled to a credit under Section 3443 (a) (2) of the Internal Revenue Code. That section says that "when the price * * * is readjusted * * * by a *bona fide* discount, rebate, or allowance," the taxable price shall be reduced by the amount of the readjustment. When an article is sold with a warranty, and fulfillment of the warranty costs the seller a certain sum, he has in fact received for the article only the amount by which the sale price exceeded the cost of fulfilling the warranty. He has, in effect, given the purchaser an "allowance" when he has spent money for his benfit. Here the findings show that the plaintiff expended $4,628,797.83 in fulfilling its five-year warranties. The Government says that some of the items shown in finding 51, making up the named sum, were improperly charged as costs of fulfilling the warranties. But the Government has stipulated that these expenses were "incurred by the plaintiff in discharging its obligations under the Protection Plan." It has not asked to be relieved from its stipulation.

The plaintiff is entitled to recover. Entry of judgment will be suspended to await the filing of a stipulation by the parties showing the amount due the plaintiff, in accordance with the foregoing opinion and the following Findings of Fact.

It is so ordered.

LARAMORE, *Judge;* and JONES, *Chief Judge*, concur.

WHITAKER, *Judge*, dissenting:

I cannot agree with the opinion of the majority. The purchaser of a refrigerator got for his money, not only a refrigerator, but also the seller's agreement that it would keep the refrigerator in good repair for a period of five years. This was an obligation over and beyond the usual manufacturer's warranty of its product.

There is an implied warranty on every sale by a manufacturer that the article is free from defects in workmanship and material. Many times these defects can be discovered only from a use of the article, and in the custom of the various trades certain periods of time are allowed for these defects to show up. If they show up within the time allowed, the manufacturer must remedy them at his own expense. If they do not show up within this time, it is presumed the break-down was not occasioned by faulty manufacture, but by something else, in which event the maker is relieved from responsibility.

In the case of automobiles, for instance, the warranty time is ordinarily 90 days, but in the case of an electric refrigerator the standard time is one year. If the machine becomes defective after the expiration of one year, the purchaser must make the necessary repairs at his own expense.

This was the rule obtaining in the case of defendant's refrigerators until the year 1933. If, prior to that time, one of their refrigerators went bad after it had been in use for more than a year, it had to be repaired at the expense of the purchaser. Ordinarily the purchaser had the repair work done by the retail dealer or the distributor,

but sometimes it was done by an outside party; but in any event it was done at the purchaser's expense.

The quality of the repair work thus done and the cost of it was causing an unfavorable reaction toward plaintiff's machines, and partly for this reason plaintiff decided to make available to a purchaser its own repair facilities. At first it offered to a purchaser an agreement to keep the machine in repair for one year after the expiration of the warranty period, or for two years, or for three years, as the purchaser might elect; or the purchaser might refuse all of these proffered agreements, and have any necessary repairs made by any person he might choose.

If the purchaser accepted any of the agreements offered by plaintiff, he was required to pay therefor $6.00 per year. If the purchaser took the three-year agreement, it would thus cost him $18.00.

Plaintiff then in 1935 determined it could offer a purchaser a four-year agreement and at the price of $10.00, instead of the former price of $18.00 for three years. This it did. Some purchasers took advantage of it and some did not.

In the following year, 1936, plaintiff concluded that if all of its purchasers of refrigerators took its four-year maintenance agreement, it could further reduce its price to $5.00. Since under previous plans a substantial number of purchasers of refrigerators had not accepted the maintenance agreements, plaintiff, in order to put the $5.00 plan into effect, found it necessary to require that all purchasers of refrigerators enter into the maintenance agreement. So, from then on what had before been optional, now became obligatory; but the price of the agreement was reduced to $5.00. It was thus successively reduced from $18.00 for a three-year agreement to $10.00 for a four-year agreement, and then to $5.00 for a four-year agreement.

From this recitation of facts it would seem apparent that what the plaintiff sold was not only a refrigerator but also an agreement to keep the refrigerator in good condition for four years, in addition to the warranty period of one year.

This was of value to the purchaser and it cost the plaintiff a substantial sum of money to fulfill it. Just how much it had cost purchasers to keep their machines in repair prior

to 1933 does not appear, but plaintiff's agreement must have saved them a considerable sum because 93 percent of the multiple-unit purchasers, who had the option of entering into the agreement or not, entered into it.

The record does show that it cost plaintiff $4,628,797.83 to fulfill its obligation under the agreements. This was an average cost of $65.00 for each unit repaired. That plaintiff was able to enter into an agreement to repair for $5.00, whereas it cost it $65.00, is explained by the relatively small number of machines that needed repair within the contract term. The total amount collected on the agreements was $10,687,115.00.

It is true that plaintiff made a profit of more than 100 percent on the agreements, but it cannot be said that an agreement which it cost plaintiff $4,628,797.83 to perform was not something substantial over and above the sale of the refrigerators. Except for these agreements, plaintiff would not have been required to expend this $4,628,797.83.

Nor can it be said that the purchaser did not receive something of substantial value in addition to the refrigerator when he paid $5.00 for plaintiff's agreement to do something which might cost it $65.00 to do.

Evidently these agreements were not a subterfuge to increase the price of the refrigerators.

It may be further said that on all sales of refrigerators these repair agreements were invoiced separately, and the amounts received from them and the cost of their performance were entered on plaintiff's books in an account separate from the account of refrigerator sales.

The cases relied on by defendant are not controlling. In *Lash's Products Company* v. *United States*, 64 C. Cls. 252, aff'd., 278 U. S. 175, the purchaser secured for his money only the article purchased, which in that case was a soft drink. In that case the Supreme Court said, "The amount added [to the purchase price] because of the tax is paid to get the goods and for nothing else." That is not true here. The purchaser got something in addition to a refrigerator. He got an agreement to keep it in repair for four years, in addition to the customary warranty period. If an automobile dealer agrees to keep my car in repair

for four years, can it be said that he has sold me nothing but an automobile?

It is also obvious that the selling and advertising expenses that go into the price of an article are not things the purchaser gets in addition to the product—which was the question involved in *Fitch Company* v. *United States*, 323 U. S. 582.

This opinion is in line with rulings of the Internal Revenue Service in comparable cases.

In S. T. 943, 1952—1 C. B. 221, pencils subject to tax "were sold by the manufacturer as a unit" with spring loaded reels or notebooks not subject to tax. The Bureau ruled that the tax attached only to "that portion of the manufacturer's sales price of the unit which is properly allocable to the taxable article."

Rev. Rul. 204, 1953—20 I. R. B. 25, a retailer of taxable silverware gave to the purchaser a non-taxable article as a sales incentive. It was ruled that the transaction constituted a sale of the silverware and a non-taxable article at a lump sum price, and that the tax should be measured only by the portion of the total amount received that was attributable to the silverware. Clearly the purchaser here had to pay the full amount to get the silverware and could not obtain the non-taxable article separately. But the tax was not imposed upon the full amount paid by the purchaser because for that amount the purchaser received something other than the taxable article.

In Rev. Rul. 224, 1953—21 I. R. B. 16, phonograph mechanisms, which are taxable under section 3404 (b) of the Internal Revenue Code, were combined with player attachments, which were not taxable, and were sold as a unit for a single price. The tax was ruled to apply only to the portion of the price attributable to the mechanism, notwithstanding the mechanism and the attachment were intended to be used together and the particular mechanism could be obtained only through payment of an amount that included the price of the non-taxable attachment.

See also S. T. 572, XI-2 C. B. 469, 1932; and Rev. Rul. 54-100, 1954—11 I. R. B. 12.

I am authorized to say that Judge Littleton joins in this dissenting opinion.

FINDINGS OF FACT

The court having considered the evidence, the report of Commissioner Richard H. Akers, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiff, General Motors Corporation, at all times material to this cause of action, was and is a domestic corporation organized and existing by virtue of the laws of the State of Delaware with its principal place of business in the City of Detroit, Michigan.

2. Frigidaire Division of the plaintiff is, and since January 1, 1934, has been, a division or branch of the plaintiff with its principal office at Dayton, Ohio. Prior to January 1, 1934, and since January 1, 1928, the business operations thereafter conducted by Frigidaire Division of the plaintiff were conducted by Frigidaire Corporation, a wholly owned subsidiary of the plaintiff.

3. The principal business of the Frigidaire Division is the manufacture and sale of electrical appliances. During the period of the claim in this action, May 10, 1937, through December 31, 1941, it manufactured and sold the following products: household refrigerators, electric ranges, electric water heaters, compressors or coils for commercial refrigeration, water coolers and water cooler tanks, beverage coolers, ice cream cabinets, milk cooler units, air conditioning equipment, store and room coolers, evaporating condensers and duct units, cooling units for soft drink equipment, mobile refrigeration and air conditioning equipment units, sealed units for replacements in refrigerators, water coolers, beverage coolers, ice cream cabinets and self-contained air conditioners, and service parts and accessories.

4. During the period of the claim in this action, certain of the articles manufactured and sold by the plaintiff were subject to the manufacturer's excise tax imposed by Section 608 of the Revenue Act of 1932 until March 1939, and thereafter by Section 3405 of the Internal Revenue Code. The plaintiff duly filed returns and paid manufacturer's excise

taxes upon its sales of such articles within the following periods during which each was subject to tax:

Household refrigerators	May 10, 1937, through December 31, 1941.
Water coolers Ice cream cabinets Beverage coolers Self-contained air conditioners	October 1, 1941, through December 31, 1941.

The taxes so paid amounted to $9,891,600.23 and are not in dispute in this action.

5. The Commissioner of Internal Revenue has assessed and the plaintiff has paid additional manufacturer's excise taxes for the period of May 10, 1937, through December 31, 1941, in the amount of $537,886.02, plus interest in the amount of $34,733.19. The payments were made to the Collector of Internal Revenue at Cincinnati, Ohio, on the dates and in the amounts as follows:

Date of payment	Period involved (dates are inclusive)	Tax assessed	Interest on tax	Total payment
10/10/39	8/1/37 through 6/30/39	$141,078.83	$8,001.93	$149,080.76
1/26/40	5/10/37 through 7/31/37	34,123.17	4,997.81	39,120.98
3/15/40	5/10/37 through 7/31/37		110.60	110.60
11/14/41	7/1/39 through 6/30/41	303,414.88	19,173.04	322,588.82
7/28/42	7/1/41 through 12/31/41	59,269.14	2,448.91	61,718.05
		537,886.02	34,733.19	572,619.21

The basis for such additional taxes was the inclusion by the Commissioner as a part of the selling price of the various appliances of an amount received by the plaintiff on account of a Protection Plan (hereinafter more particularly described both as to its nature and to its relationship to the selling price) on the various products referred to in finding 4, during the period each was subject to tax and on replacement units for such products. The total amount received by the plaintiff from this source on which the additional tax was computed aggregated $10,687,115.

6. On October 9, 1943, the plaintiff duly filed, pursuant to the applicable law and regulations, a claim for refund, and thereafter filed supplemental information in support of its claim with respect to the additional taxes and interest described in finding 5, in the total amount of $572,619.21. The claim for refund read in part as follows:

Section 3313 of the Internal Revenue Code (R. S. Section 3228 (a) as amended by Section 619 (c) of the 1928 Act, and Section 1106 (a) of the 1932 Act) provides that claim for refund of the aforementioned taxes may be filed at any time within four years next after the payment of such taxes. This claim for refund may therefore be filed at any time prior to October 10, 1943, and it is accordingly a timely claim.

Claim is hereby made for the refund of said $537,886.02 and interest of $34,733.19 plus interest as provided by law on both said amounts from the respective dates of payment.

The taxpayer claims that said tax and interest has been erroneously and illegally assessed and collected because the $5.00 charge made by the taxpayer in respect of the additional four year warranty contract under which it sold its refrigerators during the periods in question was not subject to the tax imposed by Section 608, Revenue Act of 1932, as amended, and Section 3405 of the Internal Revenue Code as amended.

If the Commissioner takes the position that the $5.00 warranty charge was an item or element in the price of the refrigerators as the basis for excise tax, then in the alternative taxpayer claims that said taxes and interest have been erroneously and illegally assessed and collected at least to the extent of the value of the four year warranty service.

7. On January 4, 1946, the Commissioner by letter sent by registered mail rendered a decision rejecting and disallowing the claim for refund referred to in finding 6.

8. The plaintiff has not included any excise tax on the amount received by it for the Protection Plan, either as a charge for the Plan or as part of the price of the products covered by such Plan, and has not collected the amount of any such tax from the purchasers of its products. However, the Commissioner collected taxes on the amount received for the Protection Plan only on the basis of 1/11th, 1/21st, or 5.5/105.5ths thereof depending upon the rate of tax in effect at the time of the sale of the appliance.

9. The Protection Plan is an agreement by the plaintiff to repair or replace the refrigerating unit in a product manufactured by it in the event such unit becomes inoperative within the first five years following the "date of delivery to the original purchaser". The original purchaser (some-

times otherwise referred to herein as "ultimate consumer" or "original user") referred to in the agreement is the first purchaser who becomes a user of the product; for example, the first householder who purchases the appliance from a dealer and has it installed in the home.

10. An amount of $5, in addition to an amount designated in its price schedule as a unit price, was charged by the plaintiff on account of the Protection Plan with respect to all products and models thereof sold during the period May 10, 1937, through December 31, 1941, except self-contained air conditioners as to which the amount varied from $7.50 to $90 depending upon the size and type of the appliance.

11. In 1936 the plaintiff first offered the Protection Plan on certain of the products manufactured by it and since then has required that the Plan be purchased on every product to which it was applicable except that where the product was purchased by a "multiple unit purchaser" the plaintiff has not required the purchase of the Protection Plan. In such latter cases the Plan has been made available at the option of the "multiple unit purchaser". A "multiple unit purchaser" is a purchaser who buys large quantities of products manufactured by the plaintiff, such as a builder, an apartment house owner, or a national account. Regardless of whether a "multiple unit purchaser" purchased the Protection Plan, he received with each appliance purchased the standard manufacturer's warranty of one year upon the entire product.

12. The plaintiff's agreement under the Protection Plan and under the "One-Year Warranty" is evidenced by a certificate captioned "5-Year Protection Plan." The certificate contained the following provisions:

> FIVE-YEAR PROTECTION PLAN—WE WARRANT every new 1936 Frigidaire Household Sealed-In Mechanical Unit to be free from defects in material and workmanship under normal use and service, and we will, within five years from date of delivery to the original purchaser, replace without any cost to the customer, any Sealed-In Mechanical Unit which our examination shall disclose to our satisfaction to be thus defective, provided, however, that by so doing we shall not be obligated to replace the complete refrigerator. The foregoing applies only to the Sealed-In Mechanical Unit under conditions speci-

fied herein, and does not apply to any other parts of the Frigidaire equipment mentioned hereinafter.

ONE-YEAR WARRANTY—WE WARRANT every new 1936 Frigidaire Household Cabinet, temperature control, fan, and starting relay to be free from defects in material and workmanship under normal use and service, and we will, within one year from delivery to the original purchaser, replace without any cost to the customer, any part or portion thereof which our examination shall disclose to our satisfaction to be thus defective. After one year from date of delivery to the original purchaser a charge will be made for any adjustments or service call (other than for the replacement of the Sealed-In Mechanical Unit as stated herein above) whereby the Frigidaire is made to operate satisfactorily, and for any repairs to the cabinet, its finish, the temperature control, the fan, or the starting relay.

13. The certificate setting forth the plaintiff's obligations under the Protection Plan and the One-Year Warranty is packed at the factory in an ice cube tray of the refrigerators and in a similarly secure place inside other products. That certificate remains with the product until it reaches the ultimate consumer. Upon installation of the appliance the installing dealer usually inserts on the certificate the cabinet and mechanical unit serial numbers and delivers the certificate to the ultimate consumer.

14. The agreement under both the One-Year Warranty and the Protection Plan constituted an obligation of the plaintiff to the ultimate consumer. The agreement was for the benefit of the user of the product protected and the period of the plaintiff's performance under the Protection Plan commenced one year after delivery of the protected product to the first user thereof.

15. During a portion of the period here involved the plaintiff included in a container in each of its products covered by the Protection Plan a questionnaire card requesting certain statistical data from the ultimate purchaser. While this card urged the purchaser to fill out and return the card to the plaintiff in order to register the Protection Plan with the plaintiff's factory, the information contained on the card was used by the plaintiff only for sales and statistical purposes and neither the execution nor the return of the card was

necessary to impose liability upon the plaintiff under the Protection Plan.

16. The physical activities of the plaintiff and others acting under its direction in discharging the plaintiff's obligations under the Protection Plan related exclusively to the reoperation of the refrigerating unit.

The amounts received by the plaintiff by reason of the Protection Plan were to cover services and obligations to which the plaintiff committed itself under the Plan and to cover expenses which would result in fulfilling these commitments. Neither the amount which the purchaser of a product was required to pay on account of the Protection Plan nor the expenses which the plaintiff expected to incur in performing its obligations under the Protection Plan entered into the unit prices (see finding 36) which the plaintiff otherwise charged for its products in 1936 when the Protection Plan was instituted or at any time thereafter.

17. The practice by a manufacturer of warranting his product has often been followed. The period of such warranty has varied depending upon the nature of the product and the use to which it is normally put. In the refrigeration industry, by the late 1920's, one year had come to be recognized and observed by most manufacturers as the appropriate period of that warranty. The plaintiff adopted the One-Year Warranty for its products about the middle of the 1920's and has continued that warranty until the present time. It extended to material and workmanship of the entire product. No separate charge has ever been made by the plaintiff for this warranty and at all times an amount calculated to cover the probable expense thereunder has been set up as a reserve, allowance for which has been made in the price of the manufactured article. The plaintiff's method of calculating this reserve has varied. Originally a fixed figure of $1 or $2 was allowed but in more recent years a percentage of manufacturing cost has been set aside to cover probable expenses under the One-Year Warranty.

18. Performance under the One-Year Warranty was and is carried out under a joint arrangement between the manufacturer and the dealer who sells the product to the original user. The former supplies the necessary material and absorbs

the transportation expenses in connection with such material, while the dealer is responsible for other labor and installation charges.

19. The reserve established by the plaintiff for the One-Year Warranty is charged with all expenses incurred by the plaintiff in performing the One-Year Warranty obligation and is closed out as an item of profit or loss on current operations.

20. During the period May 10, 1937, through December 31, 1941, the plaintiff continued to give the standard manufacturer's warranty of one year on its products. A charge for this warranty was not separately billed and accounted for but was computed into the sales price of the products which was used as the basis for the excise tax paid by the plaintiff. This warranty protected for a one-year period the refrigerating mechanism, the cabinet, temperature control, and starting relay, and parts thereof.

21. Until 1933 independent dealers and, in some cases, distributors, who sold the plaintiff's products but were otherwise unaffiliated with the plaintiff, performed the bulk of the repair service required upon products manufactured by the plaintiff following the expiration of the manufacturer's One-Year Warranty.

22. In 1933 the plaintiff became dissatisfied with the quality and cost of the service rendered by numerous of its dealers and distributors and determined to expand its own facilities and enlarge the scope of its own repair operations with the objective of providing for all the users of its products a high quality and low priced service. Since the late 1920's the plaintiff had provided some repair services at Dayton but had confined itself principally to selling service parts to dealers and others.

23. To carry out the objective described in finding 22, the plaintiff commenced to sell Service Agreements on its products in the latter part of 1933. Similar agreements, sometimes called Repair or Maintenance Agreements, had been widely used by dealers and distributors in the servicing of refrigeration products, and the plaintiff had encouraged the sale and use of such agreements.

24. Under the "Frigidaire Service Agreement" which it sold from late 1933 through 1935, the plaintiff agreed to repair, adjust and maintain as necessary the mechanical refrigerating unit on any product with respect to which the Agreement was purchased. The Agreement was sold to cover a period of one, two, or three years following the expiration of the manufacturer's One-Year Warranty at a cost of $6 per year and its purchase was optional with all purchasers of products manufactured by the plaintiff.

25. To enable it better to perform repair services under the Service Agreements it sold, the plaintiff established repair service stations in Newark, New Jersey; Kansas City, Missouri; and Oakland, California, in addition to the shop already in operation in Dayton, Ohio.

26. In 1935 the plaintiff introduced and began to sell another type of Service or Maintenance Agreement called a "Four-Year Replacement Contract". The plaintiff limited this agreement to the rotary type of mechanical refrigerating unit which powered certain of the products sold by it. Under this agreement the plaintiff undertook to replace such unit in the event it became inoperative within four years following the expiration of the manufacturer's One-Year Warranty. The cost of the agreement was $10 and its purchase was optional with the purchaser of products manufactured by the plaintiff.

27. No manufacturer's excise tax was assessed or collected on the amounts received by the plaintiff from the sale of Frigidaire Service Agreements and Four-Year Replacement Contracts in 1933, 1934, and 1935, although the products which they covered were subject to such tax.

28. In 1936 the plaintiff discontinued the sale of both the Service Agreement and the Four-Year Replacement Contract and instituted the Protection Plan. Whereas the former agreements had been sold by the plaintiff at the option of all purchasers of its products, with the institution of the Protection Plan the plaintiff required that all purchasers of its products, except multiple unit purchasers, pay in addition to the prices listed for its products an amount (usually $5) on account of the Protection Plan. By the payment of such an amount such purchasers become entitled

to the benefits of the Protection Plan. The plaintiff's purpose in instituting the Protection Plan for the agreements previously offered on an optional basis and requiring all purchasers except multiple unit purchasers to come under the Protection Plan was to make better repair service available to all users of its products at a reduced charge.

29. The plaintiff expected to increase substantially the number of participants in its service program over the number that had participated when the Service Agreements were offered on an optional basis. By thus broadening the coverage the plaintiff expected that it would be called upon to repair a smaller percentage of protected units than it had been required to repair under the optional plans previously sold by it.

The plaintiff also expected that the volume of repair business assured it through the increased number of participants would permit a substantial reduction in the unit cost of the services it was obliged to perform under the Protection Plan, and had been obliged to perform under the Service Agreements sold in the three previous years.

30. The amount which each purchaser of a household refrigerator or other product has been required to pay on account of the Protection Plan since its institution in 1936 has been $5 (except for self-contained air conditioners as to which total collections during the period involved in this suit were $450), that is, a 50 percent reduction from the amount such purchasers were required to pay under the Four-Year Replacement Contract sold by the plaintiff on an optional basis in 1935. The amount purchasers were required to pay on account of the Protection Plan resulted from the plaintiff's determination that the probable cost for the repair of a single unit would be approximately $25 and that not more than 20 percent of the units sold would become inoperative during the four-year period of the Protection Plan. On that basis it was determined that $5 from each purchaser of its products would meet the anticipated costs.

31. The plaintiffs institution of the Protection Plan and its decisions as to products to be covered and the extent to which purchasers of its products should be required to pay the additional amount on account of the Protection Plan

were not influenced by the imposition of the manufacturer's excise tax. During various portions of the period involved in this proceeding the plaintiff sold five products—water coolers, beverage coolers, ice cream cabinets, self-contained air conditioners, and replacement units—which were not subject to the manufacturer's excise tax but were nevertheless subject to the requirement for the payment of a fixed amount on account of the Protection Plan. Likewise, during the period involved in this suit, it sold three products which were subject to the excise tax—electric ranges, water heaters, and truck units—as to which the One-Year Warranty but not the Protection Plan was applicable.

32. During the entire period of the claim in this action, May 10, 1937, through December 31, 1941, the plaintiff's products were sold to ultimate users through the following distribution system:

(a) The plaintiff sold all its products for domestic use to its wholly owned subsidiary, General Motors Sales Corporation, Frigidaire Division.

(b) General Motors Sales Corporation, Frigidaire Division, sold in turn to independent distributors, whose number varied from 26 to 30.

(c) General Motors Sales Corporation, Frigidaire Division, also maintained branches, varying in number between 20 and 25, which operated as distributors of the plaintiff's products in territories not covered by independent distributors.

(d) The independent distributors and the branches of General Motors Sales Corporation, Frigidaire Division, sold in turn:

(i) to independent dealers whose number varied between 8,000 and 8,500;

(ii) directly to multiple unit purchasers; and

(iii) occasionally to ultimate consumers.

(e) The great bulk of the sales of the plaintiff's products to ultimate consumers was made by one of the dealers who had previously purchased either from an independent distributor or one of the branches of General Motors Sales Corporation, Frigidaire Division.

33. The plaintiff was credited each month by General Motors Sales Corporation, Frigidaire Division, with the total amount applicable to Protection Plans on products shipped by the plaintiff during the month. The amount so credited was separate and apart from such amounts as the Sales Corporation credited the plaintiff on account of products shipped to the Sales Corporation during the month.

34. The plaintiff made sales for domestic use of products covered by Protection Plans only to General Motors Sales Corporation, Frigidaire Division.

35. General Motors Sales Corporation, Frigidaire Division, and all its branches, as a regular practice on all invoices rendered throughout the period of the claim covered by this action billed the Protection Plan separately from the unit price of the products which the Plan protected. An invoice dated July 31, 1941, showing the information set out below, is illustrative of the manner in which the products and the Protection Plan were billed by the Sales Corporation:

Quantity shipped	Description	Unit price	Amount
15	LS-6-41 CABTS	$69.50	$1,042.50
14	L-6-41 CABTS	75.50	1,057.00
10	L-8-41 CABTS	88.00	880.00
10	C-6-41 CABTS	93.25	932.50
5	CD-6-41 CABTS	108.50	542.50
5	B-15-41 RANGES	72.00	360.00
5	B-45-41 RANGES	87.50	437.50
			5,252.00
	110 V AC 60 CY PROTECTION PLAN		270.00
			5,522.00

The ranges listed in the invoice did not come under the Protection Plan but the first five items, consisting of fifty-four units, came under the Protection Plan and, at $5 each, made the amount of $270 shown on the invoice for the Protection Plan.

36. General Motors Sales Corporation, Frigidaire Division, as a regular practice throughout the period of the claim involved in this action issued price schedules to its distributors. Such schedules had two principal purposes: (first) to establish the unit prices at which the Sales Corporation would sell products manufactured by the plaintiff; and (second) to suggest for such products cash installed

unit prices to the ultimate consumers after making due allowance for distributor and dealer mark-ups. These latter prices were suggested prices which might be made by the dealer or other party who sold to the ultimate consumers but the prices shown on the schedule to the distributor were firm figures at which sales between the General Motors Sales Corporation, Frigidaire Division, and the distributor were made so long as the price list remained effective. On the schedule, preceding the prices listed, appeared this notation:

> (Following prices are exclusive of the $5.00 charge for the additional four-year warranty on the mechanical units as included in the Five-Year Protection Plan.)

Following the prices appeared this notation:

> NOTE: There will be added to the above prices on Household Cabinets with sealed-in mechanical units a charge of $5.00 for the four-year unit replacement included in the five-year protection plan on the sealed-in mechanical unit.

37. Each of the twenty to twenty-five branches of the General Motors Sales Corporation, Frigidaire Division, issued price lists for its dealers during the period of the claim in this action. These price lists likewise listed the price at which the branch would sell the products manufactured by the plaintiff to dealers and suggested the price at which the dealer might sell such products to their customers. These lists also contained notations similar to those referred to in the preceding finding with respect to the amount of $5 for the Protection Plan.

38. Neither the plaintiff nor General Motors Sales Corporation, Frigidaire Division, nor any of the branches thereof, controlled or directed the operations or practices of the independent distributors and dealers who sold the products manufactured by the plaintiff. However, General Motors Sales Corporation, Frigidaire Division, did, as a regular practice, advise and consult with the independent distributors and, on occasion, with dealers on matters of common interest. So far as the Protection Plan was concerned, the Sales Corporation and the branches thereof suggested and advised that it should be handled as an item independent from the product it protected.

39. The independent distributors who numbered between twenty-six and thirty during the period of this claim, as a regular practice billed the amount for the Protection Plan as a separate item apart from the unit price of the product which the plan protected on all invoices rendered whether to dealers or ultimate customers.

40. The independent distributors, as a regular practice, issued price schedules to the dealers to whom they sold. These schedules served the same purposes and were issued in a similar manner as those issued by the branches of General Motor Sales Corporation, Frigidaire Division, heretofore described.

41. The practices of the independent dealers who numbered between 8,000 and 8,500 during the period of this claim were not uniform with respect to the manner in which the products which included the Protection Plan were invoiced to their customers. Some itemized the amount for the Protection Plan separate from a unit price for the product, while others rendered a bill in a single amount which included both a unit price for the product and for the Protection Plan. The dealers generally made known to prospective customers by various means, including newspaper advertisements, oral conversations, display matter and price tags, the general nature of the Protection Plan and the fact that included in the total amount paid was an amount (usually $5) on account of the Protection Plan.

42. In some instances the commissions paid to salesmen who sold the plaintiff's products to the ultimate consumer, and which products were subject to the Protection Plan, were based on the total amount paid at the time of the purchase, including the amount paid on account of the Protection Plan, whereas in other instances the commissions were based on the amount paid by the ultimate consumer at the time of the purchase, exclusive of the amount paid on account of the Protection Plan.

43. The amount of $5 fixed for the Protection Plan, as heretofore described, has been reexamined by the plaintiff at regular intervals. The factors considered by the plaintiff in such reexaminations have been the acceptability of that amount by purchasers of the plaintiff's products and serv-

ices, the percentage of defectives that have been experienced in the past and might be expected in the future, and the costs of performing repair and reoperation services.

44. In 1936 when the Protection Plan was instituted, the plaintiff offered it on an optional basis with respect to 1935 models as yet unsold to the ultimate consumer. Out of a total of 12,000 products as to which the option to purchase the Protection Plan was thus extended, the option was exercised and the Plan purchased with respect to approximately 7,000.

45. During the period of this claim approximately 100,000 household refrigerators were sold to multiple unit purchasers by the New York Branch of General Motors Sales Corporation, Frigidaire Division. All such purchasers were extended an option to buy the Protection Plan, but none were required to buy. The Plan was purchased to cover approximately 93,000 such units, and was rejected in 7 percent of the cases.

46. Because of the plaintiff's practice of changing its models annually, its experience as to rate of defectives on earlier models has provided merely an indication, not an accurate guide, as to future experience.

47. The price at which maintenance and repair agreements have been sold by others in the refrigeration industry, both prior to 1936 and since then, has been substantially higher than the price applicable to plaintiff's Protection Plan, as heretofore described. For example, a one-year contract covering switches, relays, and electrical cords has sold for approximately $4, and a one-year contract applying to switches, relays, and cords and to the sealed-in mechanical unit following the expiration of the Protection Plan has sold at a charge of between $8 and $15.

48. All of the amounts collected by the plaintiff for Protection Plans were credited to a special account called "Protection Plan—Warranty Reserve". Protection Plan collections were the only amounts credited at any time to this account.

49. Of the total amount for Protection Plans which are the basis for the claim in this action (found in finding 5 to be $10,687,115), $81,125 represents collections applicable to

Plans sold on replacement units for household refrigerators which units were not subject to manufacturer's excise tax at any time during the period of the claim in this action, and approximately $465,000 represents collections on Protection Plans sold on an optional basis by the New York Branch of Frigidaire Sales Corporation to multiple unit purchasers.

50. All of the expenses incurred by the plaintiff in performing its agreement under the Protection Plan were charged to the special account, "Protection Plan—Warranty Reserve." No other expenses were charged to this account. Within this account both collections and expenses were segregated in accordance with the product line and model year to which they were applicable.

51. As heretofore shown, the total collections on account of Protection Plans which are the basis for the claim in this proceeding were $10,687,115. The total expenses incurred by the plaintiff in performing its obligations under the Protection Plans, the collections from which form the basis of the claim in this proceeding, amounted to $4,628,797.83. These expenses were as follows:

The total amount of the cash payments made by the plaintiff to distributors and dealers for their services in connection with the repair and replacement of inoperative units	$846,375.27
Freight charges paid by the plaintiff to common carriers incident to the repair and replacement of inoperative units	372,252.74
Other Expense:	
Unit Reoperation (less compressor)	1,803,126.93
Compressor	1,062,651.01
Units Scrapped	66,614.65
Tools and Equipment	68,603.33
Experimental	5,113.75
Commercial Expense	331,313.87
Obsolete and Unsalable Stock Scrapped	25,268.28
Miscellaneous	47,478.00
Total	4,628,797.83

The average expense to the plaintiff for the repair of a single defective or inoperative unit during the period of this claim was $65.

52. The "Protection Plan—Warranty Reserve Account" is segregated by model lines. This account is reviewed by

the plaintiff frequently. At the end of a given period, when it is felt that all obligations under the Protection Plans involved are completed, any credit balances remaining in the account are closed out to an account designated "Miscellaneous Income Account" which is a type of profit and loss account.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover. Entry of judgment is suspended to await the filing of a stipulation by the parties showing the amount due the plaintiff in accordance with the foregoing opinion and the findings of fact.

IN THE UNITED STATES COURT OF CLAIMS

No. 47657

GENERAL MOTORS CORPORATION,
FRIGIDAIRE DIVISION

v.

THE UNITED STATES

ORDER

On June 8, 1954, the court rendered an opinion holding that plaintiff is entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due in accordance with the court's decision.

On September 24, 1954, said stipulation was filed, signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by the Assistant Attorney General in which it is stated that the amount due plaintiff is $238,427.93 with interest as provided by law.

Now, therefore, it is ordered this fifth day of October, 1954, that judgment be and hereby is entered for plaintiff in the sum of two hundred thirty-eight thousand four hundred twenty-seven dollars and ninety-three cents ($238,427.93), together with interest as provided by law.

By the Court:

MARVIN JONES, *Chief Judge.*

(44)

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HAROLD B. WILLEY

No. 499

Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES, *Petitioner*

v.

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEWELL W. ELLISON
Attorney for Respondent

HENRY M. HOGAN,
DANIEL M. GRIBBON,
CALVERT THOMAS,
COVINGTON & BURLING,
Of Counsel

January 28, 1955.

Supreme Court of the United States

OCTOBER TERM, 1954

No. 499

THE UNITED STATES, *Petitioner*

v.

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where the Manufacturer's Excise Tax statute explicitly exempts from tax an allowance or rebate made by the manufacturer, did the court below err in exempting as an allowance the expense of fulfilling a special repair obligation running for the purchaser's benefit for four years after the expiration of customary warranties?

STATEMENT

The decision of the court below involved three separate questions arising under the Manufacturer's Excise Tax provisions of the Internal Revenue Code of 1939. Of these three issues the petition of the United States for writ of certiorari in the instant case raises only one. Accordingly, the following statement does not set forth all the facts relating to the case below; it is confined to those facts which bear directly upon the single issue presented by that petition.[1]

During the period of the claim in this action, May 10, 1937, through December 31, 1941, the taxpayer manufactured and sold various electrical appliances, including household refrigerators, which were subject to the Manufacturer's Excise Tax (Appendix B, p. 28).[2] During this period and down to the present time all of the refrigerators[3] sold by the taxpayer have been sold, in accordance with the long-established practice of the refrigeration industry, under a warranty or guaranty covering the entire product for a period of one year from the date of installation (Appendix B, p. 33). The expense to which the manufacturer is subjected under this warranty is treated as a cost of manufacture and ultimately considered in the

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[1] The other two questions presented below and a statement of the facts relevant thereto are set forth in respondent's conditional cross-petition for writ of certiorari in General Motors Corporation, Frigidaire Division v. United States, No. 511, this Term.

[2] The opinion, findings of fact, and judgment of the Court of Claims are set out in full at Appendix B of the petition of the United States. References herein are to Appendix B of that petition.

[3] Four products other than household refrigerators are also involved here, but all raise the same question, and "refrigerators" is used hereafter for simplicity.

price charged for the refrigerator; the warranty has never been the subject of a separate charge to the consumer (Appendix B, pp. 33-34). The repair obligations under the standard one-year warranty are met jointly by the taxpayer and its dealers; the former supplies the necessary materials and the latter are responsible for labor and installation charges (Appendix B, pp. 33-34).

For several years prior to 1937 the taxpayer sold contracts under which it agreed to repair refrigerators of its manufacture if they became inoperative within specified periods following the expiration of the standard one-year warranty; refrigerator purchasers had the option to buy or to decline to buy such contracts (Appendix B, p. 35). Shortly before the period of this claim sales of these contracts were discontinued and the taxpayer began to sell instead the repair contract involved in the instant case (Appendix B, pp. 35-36). This contract was and is known as "The Protection Plan" (Appendix B, pp. 29, 35).

Under the Protection Plan, which covers only the mechanical refrigerating unit of the refrigerator, the taxpayer agrees to replace without cost any unit found to be defective within four years following the expiration of the standard warranty (Appendix B, pp. 31-32, 36). Since its introduction the taxpayer has required that the Plan be purchased by all purchasers of its refrigerators except "multiple unit purchasers" (Appendix B, p. 31). The latter are persons such as builders or apartment house owners who buy refrigerators in large quantities (Appendix B, p. 31). Such purchasers automatically receive the one-year warranty and have the option to buy the Protection Plan (Appendix B, p. 31). The charge for the Plan for all of the taxpayer's products

except one has been $5.00.[4] Many taxable products sold by the taxpayer are sold without Protection Plan coverage (Appendix B, p. 37).

The record does not reveal that any other manufacturer in any industry sells a repair contract similar to the Protection Plan.

The taxpayer contended below that the $5.00 charge for the Plan either (1) was not a part of the price of the taxable refrigerator itself, or (2) should be excluded from the tax base as an "other charge" under Section 3441(a) of the Internal Revenue Code of 1939, and sought to recover all excise taxes paid on Protection Plan collections. A majority of the Court of Claims (3-2) denied these, the taxpayer's principal claims, and these questions are not in issue on the instant petition. However, in fulfilling its obligations under the Protection Plan during the period of this claim, the taxpayer expended $4,628,797.83 (Appendix B, p. 42), and the court below held that this amount constituted an "allowance" within the meaning of Section 3443(a)(2) of the Internal Revenue Code of 1939 (Appendix B, p. 23). Since the amount expended to replace the refrigeration units effected a reduction in the amount realized by the taxpayer from the sales of refrigerators, the court held that the taxpayer was entitled to a refund of the excise taxes paid with respect to the amounts expended under the Protection Plan.

The amounts expended by the taxpayer in making good on the customary manufacturer's one-year warranty were not involved in the case before the Court

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[4] The cost of the Protection Plan covering self-contained air conditioners varies between $7.50 and $90.00, depending upon the size and type of the appliance (Appendix B, p. 31). Total collections from the sale of the Plan on such appliances during the period here involved were only $450.00 (Appendix B, p. 36).

of Claims and did not in any way enter into the computation of the judgment of $238,427.93 (with interest) that was entered in the taxpayer's favor (Appendix B, pp. 42, 44).

ARGUMENT

1. In view of the narrow scope of the decision below and the absence of conflict with any other decision, there are no special or important reasons that warrant review by this court.

The principal reason advanced by petitioner for granting a writ of certiorari in the instant case is the alleged importance of the question decided below. This importance, it is said, stems from the fact that the Court of Claims has held "that *all* expenditures incurred in making good on *any kind of warranty*—be it separately charged for or not, be it express or implied—now go to reduce the tax payable . . ." (Petition, pp. 6-7; emphasis supplied). On the basis of this assertion petitioner claims that the decision involves thousands of taxpayers and millions of dollars. It is extremely doubtful that such estimates, even if accurate, would be sufficient to establish the significance and importance required for certiorari review;[5] but that question need not be considered for the simple reason that the court below did not hold what petitioner says it held.

During the period of this claim the taxpayer did grant to its customers a warranty which was substantially similar to warranties employed throughout the refrigeration industry. But the expenses incurred in

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[5] Federal taxation brings into the Treasury such substantial sums of money and draws upon such a broad base that almost any tax case can be estimated to involve many millions of dollars and several thousands—or even millions—of taxpayers.

making good on that warranty were not before the Court of Claims; there was no occasion for a decision on that question, and no decision was in fact made.

The only tax credit issue presented below, and hence the only tax credit issue involved here, was the question of a credit for expenditures incurred under the unique Protection Plan employed by the instant taxpayer. The record shows that the Plan differs substantially from the standard warranty in origin, scope of obligation, method of fulfillment, and effect on the price of the taxable product (Appendix B, pp. 33-34). The record does not show that any other manufacturer in any industry offers a repair contract which resembles in any way the repair obligation considered by the Court of Claims. Under these circumstances, review by this Court cannot be justified in terms of the significance of the question presented by the petition. Judging by the record, rather than by the unsubstantiated speculations of the petition, a decision by this Court can do no more than resolve one aspect of the excise tax status of the unique business practice of a single manufacturer.

The extent to which the petition is based upon speculation going beyond the decision below appears from the effort made to establish the "far-reaching significance of the Court of Claims ruling" (pp. 5, 6). After stating erroneously that the court below held that all warranty expenditures were "allowances" under the excise tax statute, and after listing some 30 appliances on which the excise tax is imposed, the petition asserts:

> "It is common knowledge that *most* of these articles are sold with *some kind* of warranty." (Emphasis supplied)

This vagueness is illuminated neither by the decision below nor by the record. They are both confined to the business practice of a single taxpayer and cannot appropriately serve as the vehicle for the advisory opinion which the petition seeks with respect to other kinds of warranties on other kinds of appliances.

Petitioner does not assert any of the other accepted reasons for granting the writ. There is no claim, and could be no claim, that the decision below is in conflict with any judicial decision, either of this or of any other Court, because none exists. In lieu thereof, the argument is made that because of the nation-wide jurisdiction of the Court of Claims, and the probable preference for that forum on the part of claimants seeking refunds in similar cases, it is "extremely unlikely that a conflict on this point will ever develop" (Petition, p. 10). Petitioner's conclusion is that the absence of conflicting decisions should not weigh against a grant of certiorari. But acceptance of this argument would effect an outright departure from the traditional practice of this Court and from the clear intent of Rule 19(2) requiring that the decisions of the Court of Claims be treated in the same way as any other decision for the purposes of certiorari review. The petitioner's argument could be applied to cases involving other types of taxes, not just excise taxes, and if accepted, it would become comparatively easy to obtain certiorari review of Court of Claims tax decisions with which the Government disagrees. The decision below, it is submitted, must be viewed as having the same limited significance as the decision of a Court of Appeals which is entirely free from conflict with any decision of another court.

2. THE QUESTION HERE PRESENTED WAS CORRECTLY DECIDED BELOW.[6]

The Manufacturer's Excise Tax provisions of the Internal Revenue Code of 1939 expressly recognize the injustice of basing the tax upon the initial selling price of a taxable article. With an eye to the economic realities of the world of commerce, the Code taxes the amount attributable to the sale of the taxable article but only to the extent that it is ultimately retained by the manufacturer. Thus a charge for insurance, or installation, since it does not result in a benefit to the manufacturer, is expressly excluded from the "tax price" of the article under Section 3441(a), even though it be part of the price paid by the purchaser. By the same token Section 3443, the provision here involved, is broadly phrased to take into account all actions by the manufacturer that result, directly or indirectly, in a readjustment of the proceeds initially derived by him from the sale. Return or repossession of the article or a covering or container, discounts, rebates, and allowances are all specifically recognized by the Code.

The expenses incurred by the taxpayer in fulfilling its obligations under the Protection Plan benefited the users of its refrigerators at least as much as if that amount had been distributed to them in cash. The amounts thus expended by the taxpayer in making allowances in kind to such users clearly had the

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[6] In its conditional cross-petition for certiorari, No. 511, this Term, respondent has asserted that the Court erred in failing to hold that the entire amount collected for Protection Plans was not subject to the Excise Tax, and it adheres to that view. If, however, it is incorrect in that position, then the holding of the court below is correct.

effect of reducing the amount realized by it from the sale of refrigerators. The court below correctly concluded that the tax price, or the amount ultimately attributable to the sale of the refrigerator, was only that amount by which the initial sales price exceeded the expenses of making allowances in kind. Accordingly, it held that the taxpayer was entitled to a refund of taxes paid with respect to the amounts expended under the Protection Plan. The decision is a fair and correct application of Section 3443 of the Internal Revenue Code and is consistent with both the purpose and the language of that section.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Government's petition for writ of certiorari to the United States Court of Claims should be denied.

NEWELL W. ELLISON
Attorney for Respondent

HENRY M. HOGAN,
DANIEL M. GRIBBON,
CALVERT THOMAS,
COVINGTON & BURLING,
Of Counsel.

January 28, 1955.

31/23

FILE
JAN
HAROLD B. WILL

No. 511

Supreme Court of the United States

OCTOBER TERM, 1954

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION,
Petitioner

v.

THE UNITED STATES, *Respondent*

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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JANUARY 3, 1955

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Supreme Court of the United States

OCTOBER TERM, 1954

No.

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION,
Petitioner

v.

THE UNITED STATES, *Respondent*

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

This is a conditional cross-petition for writ of certiorari arising out of the same matter as the petition of the United States in *United States* v. *General Motors Corporation, Frigidaire Division,* No. 499, this Term. To avoid confusion, cross-petitioner will be referred to herein as plaintiff, and the United States will be sometimes referred to as defendant.

Plaintiff brought this action in the United States Court of Claims to recover $572,619.21 in Manufacturer's Excise Taxes. The Court of Claims entered judgment for plaintiff in the sum of $238,427.93, together with interest as provided by law. This cross-petition seeks a writ of certiorari in the event that the

petition in No. 499 is granted, and plaintiff relies on the record therein.

OPINION BELOW

The opinion of the Court of Claims is reported at 121 F. Supp. 932 (Appendix B, p. 20).[1]

JURISDICTION

The final judgment of the Court of Claims was entered on October 5, 1954 (Appendix B, p. 44). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1255(1).

QUESTIONS PRESENTED

1. Does the Manufacturer's Excise Tax imposed by the applicable Federal statutes upon the selling price of a refrigerator apply also to amounts paid to a manufacturer for its contract to repair specified defects in the refrigerator for a period of four years following the expiration of the customary manufacturer's warranty of one year?

2. Where the applicable statutes expressly exempt from the Manufacturer's Excise Tax a "transportation, delivery, insurance, installation, or other charge," may a manufacturer's charge for its contract to repair be subjected to this tax?

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[1] The opinion, findings of fact, and judgment of the Court of Claims are set out in full at Appendix B of the petition of the United States in No. 499 and have not been reprinted here. References herein to "Appendix B" refer to Appendix B of that petition.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 3405. TAX ON MECHANICAL REFRIGERATORS.

There shall be imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 5 per centum of the price for which so sold:[2]

(a) Household type refrigerators (for single or multiple cabinet installations) operated with electricity, gas, kerosene, or other means (including parts or accessories therefor sold on or in connection therewith or with the sale thereof).[3]

* * *

SEC. 3441. SALE PRICE.

(a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the fore-

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[2] The rate of tax was raised to 5½% on June 30, 1940 (54 Stat. 523) and to 10% on October 1, 1941 (55 Stat. 713).

[3] 53 Stat. 412. The section is a codification of and substantially the same as Sec. 608 of the Revenue Act of 1932, 47 Stat. 263. It was amended by Section 546 of the Revenue Act of 1941, 55 Stat. 713, which added several taxable articles including beverage coolers, ice cream cabinets, water coolers, and self-contained air conditioners.

going sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.[4]

* * *

SEC. 3443. CREDITS AND REFUNDS.

(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * *

(2) to any person who has paid tax under this chapter with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.[5]

* * *

STATEMENT

During the period of the claim in this action, May 10, 1937, through December 31, 1941, plaintiff manutured and sold various electrical appliances, including household refrigerators, which were subject to the Federal Manufacturer's Excise Tax (Appendix B, p. 28). It paid excise taxes in the amount of $9,891,-600.23 upon the selling price of such products, and those taxes are not here in dispute (Appendix B, pp. 28-29).

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[4] 53 Stat. 416. The section is a codification of and substantially the same as Sec. 619 of the Revenue Act of 1932, 47 Stat. 267.

[5] 53 Stat. 417. The section is a codification of and substantially the same as Sec. 621 of the Revenue Act of 1932, 47 Stat. 267-268.

During this period plaintiff also sold, in addition to the refrigerators,[6] certain repair contracts by which plaintiff agreed to repair the refrigerators covered by the contracts for a specified period after delivery. The Commissioner of Internal Revenue asserted that the amounts paid to plaintiff for such contracts constituted part of the selling price of the refrigerators themselves and assessed additional excise taxes in the amount of $572,619.21 (Appendix B, p. 29). These additional taxes were paid by plaintiff under protest; its claim for refund was denied and this action to recover such additional taxes was brought in the Court of Claims (Appendix B, pp. 29-30).

1. The Facts

The historical background of the "Protection Plan" (which was the name of the contract sold by plaintiff), and the relationship between the charge made for the Plan and the price of the refrigerator covered thereby, constitute the determinative facts in this case.

It has long been the practice of manufacturers to warrant or guarantee their products for periods varying with the characteristics of the product and the use to which it is normally put (Appendix B, p. 33). In the refrigeration industry by the late 1920's one year had come to be generally recognized as the appropriate warranty period (Appendix B, p. 33). Plaintiff adopted the One-Year Warranty in the mid-1920's and has continued that warranty down to the present time (Appendix B, p. 33). It covers the entire product and has never been the subject of a

---

[6] Four products other than household refrigerators are involved here, but all raise the same question, and "refrigerators" is used hereafter for simplicity.

separate charge; an allowance for the estimated expenses of fulfilling this obligation is included in the cost of the manufactured article and ultimately considered in establishing the article's price (Appendix B, pp. 33-34). The warranty obligation is discharged jointly by plaintiff and its dealers; the former supplies the necessary materials and the latter is responsible for labor and installation charges (Appendix B, pp. 33-34).

In 1933 plaintiff became dissatisfied with the quality and the cost of the repair service that was rendered by independent dealers and others after the warranty had expired; it decided to enlarge its own minor repair facilities in order to provide for all users of its products a high quality, reasonably priced repair service (Appendix B, p. 34). It therefore commenced to sell a "Frigidaire Service Agreement" by which it contracted to repair and maintain the mechanical refrigerating unit of the product covered by the contract for a specified period following the expiration of the product's One-Year Warranty (Appendix B, pp. 34-35). This Agreement could be purchased by the customer at his option for a period of one, two or three years for $6.00 a year (Appendix B, p. 35).

In 1935 plaintiff introduced a "Four-Year Replacement Contract" pursuant to which it undertook to replace the mechanical unit in its refrigerator if that unit became inoperative within four years following the expiration of the One-Year Warranty (Appendix B, p. 35). Purchase of this contract was also optional with the customer; the cost was $10.00 for the four-year period of the agreement (Appendix B, p. 35). Although the refrigerators protected by the "Frigidaire Service Agreements" and the "Four-Year

Replacement Contracts" were subject to the Manufacturer's Excise Tax in 1933, 1934 and 1935, no such tax was assessed or collected on the proceeds from the sale of the contracts themselves (Appendix B, p. 35).

In 1936 plaintiff decided that if the number of persons to whom it sold its repair contracts were increased, it would be called upon to repair a smaller percentage of protected units and it would be able to effect a substantial reduction in the price at which it could sell its service (Appendix B, p. 36). For the purpose, therefore, of making a better repair service available to all users of its products at a reduced charge, plaintiff in 1936 discontinued the sale of both the "Frigidaire Service Agreements" and the "Four-year Replacement Contracts" and began selling instead the repair contract involved in the instant case (Appendix B, pp. 35-36).

This contract was and is known as the "Protection Plan" (Appendix B, pp. 29, 35). The undertaking for each article is set forth in a separate certificate which also contains the terms of the traditional One-Year Warranty, and this certificate is delivered to the customer at the time of installation (Appendix B, p. 32).[7]

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[7] The certificate reads as follows (Appendix B, pp. 31-32):

"FIVE-YEAR PROTECTION PLAN—WE WARRANT every new 1936 Frigidaire Household Sealed-In Mechanical Unit to be free from defects in material and workmanship under normal use and service, and we will, within five years from date of delivery to the original purchaser, replace without any cost to the customer, any Sealed-In Mechanical Unit which our examination shall disclose to our satisfaction to be thus defective, provided, however, that by so doing we shall not be obligated to replace the complete refrigerator. The foregoing applies only to the Sealed-In Mechanical Unit under

Since the introduction of the Plan, plaintiff has required that it be purchased by all purchasers of refrigerators except "multiple unit purchasers" (Appendix B, p. 31). The latter are persons such as builders or apartment house owners who buy refrigerators in large quantities (Appendix B, p. 31). Such purchasers automatically receive the One-Year Warranty, and they also have the option to buy the Protection Plan (Appendix B, p. 31). When such multiple unit purchasers elect to buy the Protection Plan, they receive the same contract that is sold to the single unit purchaser, and it is incorporated in the same type of certificate that the single unit purchaser receives (R. 25-26).

The charge for the Plan for all products except one[8] has been $5.00, a 50 per cent reduction from the charge previously made for its immediate predecessor, the

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conditions specified herein, and does not apply to any other parts of the Frigidaire equipment mentioned hereinafter.

"ONE-YEAR WARRANTY—WE WARRANT every new 1936 Frigidaire Household Cabinet, temperature control, fan, and starting relay to be free from defects in material and workmanship under normal use and service, and we will, within one year from delivery to the original purchaser, replace without any cost to the customer, any part or portion thereof which our examination shall disclose to our satisfaction to be thus defective. After one year from date of delivery to the original purchaser a charge will be made for any adjustments or service call (other than for the replacement of the Sealed-In Mechanical Unit as stated herein above) whereby the Frigidaire is made to operate satisfactorily, and for any repairs to the cabinet, its finish, the temperature control, the fan, or the starting relay."

[8] The cost of the Protection Plan covering self-contained air conditioners varies between $7.50 and $90.00, depending upon the size and type of the appliance (Appendix B, p. 31). Total collections from the sale of the Plan on such appliances during the period here involved were only $450.00 (Appendix B, p. 36).

Four-Year Replacement Contract (Appendix B, pp. 31, 36). The amount of this charge, which under regular practice is stated separately from the unit price of the product in billing, sales literature, and company accounting (Appendix B, pp. 38-40), was initially fixed on the basis of plaintiff's determination that the probable cost for the repair of a single unit would be approximately $25.00, and that not more than 20 per cent of the units sold would become inoperative during the protection period (Appendix B, p. 36). Accordingly, the $5.00 amount was and is based upon the actual anticipated costs of the services and obligations to which plaintiff committed itself under the Plan and for which it would not otherwise be committed (Appendix B, pp. 33, 36). Plaintiff has reexamined the amount of the charge at regular intervals in the light of past and anticipated repair costs (Appendix B, pp. 40-41).

Neither the $5.00 charge nor the expenses incurred by plaintiff in fulfilling its obligations under the Plan has ever been a factor in the determination of the unit prices charged for refrigerators (Appendix B, p. 33). Neither the amount of the charge nor the institution of the Plan itself was influenced in any way by the imposition of the Manufacturer's Excise Tax; some nontaxable products manufactured and sold by plaintiff have been covered by the Plan, and on some taxable products no Plan has ever been sold (Appendix B, p. 37).

The foregoing description of the historical development of the Plan and related business practices reflects only the experience of plaintiff. The record does not disclose that any manufacturer other than plaintiff offers a repair contract similar to the Protection Plan.

2. The Decision Below

Plaintiff asserted three alternative grounds for recovery of the excise taxes paid on the proceeds of its sales of the Protection Plan:

(A) It contended that it sold two items of independent substance and value: a refrigerator and a repair contract. The amount received for the refrigerator was properly subject to the Manufacturer's Excise Tax under Section 3405 of the Internal Revenue Code of 1939. But there is no statutory authority for the imposition of a tax on the amount received from the sale of the repair contract, whether it is sold separately or in combination with a refrigerator.

A majority of the Court of Claims (3-2) held that the $5.00 charge for the Protection Plan constituted a part of the selling price of the refrigerator and should, therefore, be subject to the excise tax on refrigerators. Plaintiff's first claim for the full amount of the excise taxes paid on Protection Plan collections was accordingly denied.

(B) Alternatively, plaintiff relied upon Section 3441(a) of the Internal Revenue Code of 1939, which directs (i) that there be included, in computing the excise tax, "any charge incident to placing the article in condition packed ready for shipment," but (ii) that there be excluded from the tax base a "transportation, delivery, insurance, installation, or other charge." The term "other charge," it was contended, must be interpreted to include any charge that is not incident to placing the article in condition packed ready for shipment; since the price of the Protection Plan was not incident to placing the refrigerator in condition for shipment but was a charge to cover expenses incurred by the manufacturer long after shipment of the

article, the statute requires that that charge be excluded in the computation of the tax.

A majority of the Court of Claims held that the charge for the Protection Plan was not a charge exempted from tax by the statute, and recovery on the basis of plaintiff's second claim for the full amount of the excise taxes paid on Protection Plan collections was accordingly denied.

(C) Alternatively, plaintiff relied upon Section 3443(a)(2) of the Internal Revenue Code of 1939 for partial recovery of the excise taxes it had paid on amounts collected for the Protection Plan. This section grants to a taxpayer a credit against excise taxes paid to the extent that "the price . . . is readjusted . . . by a bona fide discount, rebate or allowance; . . . "

A majority of the Court of Claims held that the amount expended by plaintiff in fulfilling its obligations under the Protection Plan constituted an "allowance" to the purchasers of its products, and that plaintiff was entitled to recover the excise taxes (with interest) paid on such amount.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari in No. 499 seeks review of the decision below only with respect to the single holding (on the third claim described above) that plaintiff was entitled to partial recovery because the expense of discharging its obligations under the Protection Plan constituted an allowance to its customers. This petition is filed to preserve for plaintiff the right to present all of its contentions in the event that this Court sees fit to grant the petition in No. 499. See *Langnes* v. *Green*, 282 U.S. 531, 536-539 (1931); *Morley Construction Co.* v. *Maryland*

Casualty Co., 300 U.S. 185, 191 (1937); *Le Tulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940).

Plaintiff believes that the decision below is incorrect insofar as it denied recovery of the excise taxes levied on the full amounts received by plaintiff from the sales of the Protection Plan. As the record plainly shows, plaintiff sold and its purchaser received "something in addition to a refrigerator. He [the purchaser] got an agreement to keep it in repair for four years, in addition to the customary warranty period" (Appendix B, p. 26). The decision below thus constitutes a substantial amendment of a taxing statute which, as written by Congress, applies only to amounts received from the sale of refrigerators. The Court of Claims also erred in passing upon plaintiff's alternative claim for full recovery. Even if the charge for the Protection Plan be considered as part of the sales price of the refrigerator, it is a charge to cover expenses arising after delivery of the taxable product and is excluded from the tax base by Section 3441(a) of the Internal Revenue Code of 1939.

However, neither the portion of the majority decision which denied plaintiff full recovery nor the portion which granted it partial recovery appears to warrant the grant of certiorari by this Court. Both seem to be plainly lacking in the "special and important reasons" which are required to move this Court to exercise its discretionary jurisdiction. Neither portion is in conflict with any decision of a Court of Appeals or District Court; the questions of Federal law involved are of but limited significance, even in the administration of the Internal Revenue laws; and the decision below lays down no generally applicable principle, because the particular facts relating to the Protection Plan control the holdings and limit their appli-

cability. Accordingly, plaintiff respectfully limits its petition for certiorari and requests that it be granted only in the event that the petition of the United States in No. 499 is granted.

The three questions presented for determination below are closely related, however, and should be reviewed together, if at all. In order to reach plaintiff's third claim—that is, the claim that expenses of performance under the Protection Plan constituted an allowance or rebate against the selling price of the refrigerators—the Court of Claims had first to decide that the $5.00 charge for the Plan in fact constituted part of the selling price of the refrigerator; until the latter determination had been made, the question of an "allowance" could not possibly have arisen. The same is true of plaintiff's second claim; until the court decided that the $5.00 charge was *not* an "other charge" which must be excluded from the excise tax base, there was no occasion to consider the allowance credit question at all. The entire decision of the Court of Claims thus proceeds from the premise that the $5.00 charge for the Protection Plan is part of the selling price to be included in the excise tax base.

This interdependence of the three questions makes it appropriate that this cross-petition be granted if the Court grants the petition in No. 499. As suggested above, all three issues are grounded upon the same factual conclusion; accordingly, review by this Court of any one of the three questions will necessarily involve a complete and detailed reexamination of plaintiff's business practices. If such an examination is to be undertaken on the petition in No. 499, review of the issues presented in this cross-petition will not entail any significant additional burden for the Court.

CONCLUSION

Plaintiff prays that, in the event that the petition in No. 499 is granted, a writ of certiorari be directed to the United States Court of Claims in order that this Court may review the questions presented herein.

Respectfully submitted,

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JANUARY 3, 1955

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 511

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

This cross-petition, as well as the Government's petition for certiorari in No. 499, seeks review of a decision of the Court of Claims on June 8, 1954 (Appendix B, pp. 20–28),[1] which held: (1) A compulsory $5 charge by General Motors on the sale of virtually all of its refrigerators for a 5-year warranty on the refrigerating unit must be included in the excise tax base; and (2) the expenses incurred in fulfilling a warranty are in the nature of "a bona fide discount, rebate, or al-

[1] All references to Appendix B are to the appendix to the Government's petition in No. 499.

lowance" under Section 3443 (a) (2) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 3443), and hence are deductible for excise tax purposes. Accordingly, the Court of Claims concluded that General Motors was entitled to a $240,000 refund on account of the expenses incurred by it over the years in fulfilling the 5-year warranties on refrigerators sold during the period from May 10, 1937, to December 31, 1941.

In No. 499, the Government is requesting review of the second holding on the ground that it is of large importance in the administration of the excise tax and is clearly contrary to both the statute and the Regulations. In No. 511, General Motors has filed the present conditional cross-petition to preserve its position on the issue of the includability of the $5 charge in the excise tax base,[2] in the event review is granted on the issue presented by the Government's petition, *viz.*, the deductibility of expenses incurred in making good on a warranty.

While we do not agree with petitioner that the first issue was incorrectly decided below or that it is inseparably related to the second issue, we do

[2] General Motors' contention that the $5 should be excluded was based on two separate arguments—first, that the warranty was a separate item not subject to the manufacturers' excise tax, and second, that the warranty charge was excludable as a "transportation delivery, insurance, installation, or other charge," under Section 3441 (a) of the Internal Revenue Code of 1939. (26 U. S. C. 1952 ed., Sec. 3441.) The Court of Claims rejected both these arguments.

not oppose the granting of this cross-petition if the Government's petition in No. 499 is granted. As set forth in greater detail in the Government's petition in No. 499, we believe the questions presented by the decision of the Court of Claims in this case are of such magnitude and importance as to warrant review by this Court.

1. The decision below, in holding that the $5 warranty payment must be included in the excise tax base, is clearly correct. Simply because this manufacturer gave a somewhat different kind of warranty from that which the law, in the absence of contract, might imply, it does not follow that the warranty must be regarded as a separate item which, since Congress did not list warranties among the articles subject to the manufacturers' excise tax, is altogether tax-exempt. Such reasoning would be completely artificial. As the Court of Claims pointed out, General Motors sold "a warranted refrigerator," not "a refrigerator and something else." (Appendix B, p. 21.) Moreover, if this compulsory charge, completely within the manufacturer's control, were held to be altogether exempt from tax, an easy device for reducing the tax base, by decreasing the cost of the refrigerator and increasing the cost of the warranty, would be created. It is for this and other persuasive reasons that the Internal Revenue Service has consistently ruled, since the enactment of the taxing statute in 1932, that such

warranty charges are a part of the tax base. Similarly, we think that the Court of Claims was clearly right in its conclusion that a warranty charge cannot be assimilated to such excludable items as transportation, delivery, insurance or installation charges.

2. In view of the manner in which the issues were framed by the taxpayer, if the Court of Claims had concluded, as urged by General Motors, that the $5 charge was not includable in the excise tax base, that court probably would not have reached the second issue dealing with the deductibility of the warranty expenditures. But it is apparent that the Court of Claims' holding on the second issue is so broad and unqualified that it goes completely beyond, and hence stands entirely independent of, the first issue. This is illustrated by the fact that the net effect of the decision below on the second issue is to allow General Motors an approximately $65 deduction in the case of each defective refrigerator (Appendix B, p. 42) while only $5 was held to be includable in the tax base as a result of the decision on the first issue. Moreover, General Motors itself apparently has construed the holding on the second issue in its broadest sense, since, subsequent to the decision below, it amended its other pending refund claims to add its expenses under its *one-year warranty*, for which no separate charge is made, and as to

which, therefore, the first issue does not arise.[4] (See No. 499, Govt's Pet. 6–8, fn. 4, 5.)

CONCLUSION

For the reasons stated, if the Government's petition in No. 499 is granted, it would appear appropriate to review all the questions raised by the decision below, and, accordingly, to grant the taxpayer's cross-petition in No. 511.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

JANUARY 1955.

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[4] This action by General Motors is in marked contrast to its statement in the present cross-petition (pp. 12–13) that "the decision below lays down no generally applicable principle, because the particular facts relating to the [five-year] Protection Plan control the holdings and limit their applicability."

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